

**MEMORANDUM OF THE UNITED STATES IN OPPOSITION
TO COMPTTEL'S MOTION FOR LEAVE TO INTERVENE,
OR IN THE ALTERNATIVE TO PARTICIPATE AS AMICUS CURIAE**

EXHIBIT 2

filed in

United States v. SBC Communications, Inc. and AT&T Corp.,
Civ. Action No. 1:05CV02102 (EGS) and
United States v. Verizon Communications and MCI, Inc.,
Civ. Action No. 1:05CV02103 (EGS)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

IMETAL,
DBK MINERALS, INC.,
ENGLISH CHINA CLAYS, PLC, and
ENGLISH CHINA CLAYS, INC.,

Defendants.

PAPER, ALLIED-INDUSTRIAL,
CHEMICAL AND ENERGY WORKERS
INTERNATIONAL UNION,

Movants.

Civil Action
No. 99-1018 (GK)

FILED

MAY 26 2000

BARBARA WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM-OPINION

Upon consideration of the Motion of Heritage Plastics, Inc. to Intervene Or, In The Alternative, to Appear as Amicus Curiae, the Opposition of the United States, the Response of the Defendants, the Reply of Heritage Plastics, Inc., the applicable case law and the entire record herein, the Court concludes that the motion is **denied** for the following reasons:

Heritage Plastics Inc., ("Heritage" or "HPI"), seeks to intervene in the pending civil antitrust case in order to gain access to the Antitrust Division's determinative documents relating

to the market for Ground Calcium Carbonate ("GCC")¹, and to fully contest (and appeal if necessary) the proposed consent decree which Plaintiff and Defendants have negotiated.

In seeking to intervene, Heritage relies heavily on the following facts: that the combined Imetal/ECC entity has a market share of approximately 98% of the high grade GCC product that Heritage purchases and a market share of approximately 65% of the low grade GCC product that Heritage purchases; that since the announcement of the merger, Imetal/ECC has increased the price for its high grade GCC product by 56%; that Imetal/ECC has initiated a very costly "return policy" for any of its product that is discovered to be defective or unsuitable for use; and that a far greater percentage of that product is proving to be defective or unsuitable than had previously been the case.

In response the government and the Defendants offer several main arguments: that Heritage's purchases do not fall within the scope of the Complaint, that Heritage has suffered and will suffer no competitive injury from the Imetal/ECC merger, and that its filing is untimely, and would unduly delay the proceedings and prejudice the rights of the original parties.

¹ Ground Calcium Carbonate is calcium carbonate that has been crushed in a dry grinding process and then further ground in a wet process. When Ground Calcium Carbonate is left in a slurry form, its main purchaser is the paper industry. When the slurry form of Ground Calcium Carbonate is further dried and surface treated, it is purchased by HPI and other users which manufacture certain types of plastic films. One of the types of plastic films which HPI manufactures is used in the backsheet of disposable diapers for infants and children. HPI and its competitors purchase less than one tenth the amount of GCC that the paper industry purchases.

The Court does not find the last argument persuasive. In its pleadings, Heritage makes it very clear that it was not until Imetal/ECC imposed the latest price increase (amounting to a total price increase of 56% versus 7% in the preceding 4 ½ years) and the costly "return policy", that it decided to challenge the merger and the proposed Consent Decree. Thus, Heritage did not delay in filing its Motion to Intervene, nor would litigation of that Motion unduly prejudice the rights of the parties in light of the fact that two of the four divestitures required by the decree have already been completed, one has been presented to the government and is being reviewed, and only one remains to be negotiated.

As to the first two arguments, the Court does find them convincing.

I. Scope of the Complaint

In Paragraph 1 of its Complaint, the government defined the four separate markets in which competition was likely to be substantially lessened because of the proposed acquisition of ECC by Imetal. One of those four markets was Ground Calcium Carbonate, or GCC, sold in slurry form for the paper industry; it is also referred to as paper-grade GCC and fused silica.

Heritage does not deny that it does not buy paper-grade GCC; rather, it buys a different type of ground calcium carbonate product referred to as "plastic GCC". (see Memorandum in Support of Motion of Heritage, p.2). The government did not allege in its Complaint that the proposed merger between Imetal and ECC would substantially lessen competition in the market for extra-fine

plastic GCC products, such as Film-Link, that are sold for use in the compounds Heritage purchases. Heritage does not deny that plastic GCC goes through additional processing steps that paper-grade GCC does not undergo (id.), nor that a buyer of plastic GCC cannot use paper-grade GCC.

Heritage argues that it buys from the same "upstream" GCC product source and product line as the paper industry with the exception that its plastic GCC "has simply undergone additional or slightly different 'kneading' steps" (id.). That "exception", which Heritage would like to minimize, however, alters the entire picture. As the government points out in its Opposition, Heritage does not buy the paper-grade GCC which is the subject matter of the Complaint; rather, it buys a different ground calcium carbonate product, the plastic GCC, which is not the subject matter of the Complaint. Whether the product Heritage buys is labelled as merely a "downstream" by-product or, more accurately, as a "tributary" by-product, either of which is derived from the "upstream" GCC product source sold by Imetal/ECC, the fact of the matter is that paper-grade GCC and plastic GCC are different products.²

The government has made the discretionary prosecutorial decision to single out only the former, and not the latter, as the

² As Defendants have explained in their Response, "While it is true that both types of products might have their origins at the same quarry site and pass through similar initial crushing, washing and milling stages, their subsequent manufacturing diverges at a relatively early stage in the processing circuit". (Defendants' Response to Motion of Heritage Plastics, p. 2.)

market area in which the merger of Imetal and ECC would lessen competition. Consequently, as our Court of Appeals made clear in Microsoft, the district court cannot "reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made." United States v. Microsoft, 56 F.3d 1448, 1459 (D.C. Cir. 1995).

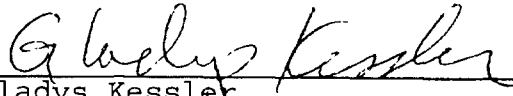
II. Absence of Merger-Related Competitive Harm

Heritage cannot demonstrate that the harm it claims to have suffered--the very sharp price increase and imposition of a very unfavorable "return policy"--is the result of the Imetal/ECC merger. Prior to the merger, Imetal and ECC did not compete in the manufacture or sale of plastic GCC because Imetal did not produce such a product, or any reasonable equivalent. Consequently, Imetal's acquisition of ECC could not have increased the market concentration in the manufacture or sale of plastic GCC because Imetal was not a participant in the market for that product before the merger. Whatever the reason for the price increase in plastic GCC and imposition of the "return policy", it could not be because the merger lessened competition and increased market power with respect to that product.

For all the foregoing reasons, Heritage has failed to establish that it is entitled to intervene pursuant to the Tunney Act, 15 U.S.C. § 16(b)-(h), or Fed. R. Civ. P. 24 (a) or (b), and the Motion to Intervene must be **denied**.

Wherefore, it is this ~~25th~~ day of May 2000, hereby

ORDERED, that the Motion of Heritage Plastics, Inc. to Intervene or, In the Alternative, to Appear as Amicus Curiae is denied.


Gladys Kessler
United States District Judge

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